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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-385

ANTHONY D. VOLPE, MICHAEL T. O'BRIEN, LAWRENCE DI BENEDETTO, JOHN T. DELLAFERRA, CHARLES BOORNAZIAN, EUGENE POULIN, WILLIAM JACOMINI, RICHARD BOVINO, ROBERT E. MORRIS, FRANK CECCHINI, GEORGE SPEZIALE and JOHN LEPITO,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ANTHONY D. VOLPE and DENNIS BYRNE,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ANNE STEFANOU,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

MICHAEL T. O'BRIEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ANTHONY D. VOLPE, MICHAEL T. O'BRIEN, LAWRENCE DI BENEDETTO, JOHN T. DELLAFERRA, CHARLES BOORNAZIAN, EUGENE POULIN, WILLIAM JACOMINI, RICHARD BOVINO, ROBERT E. MORRIS, FRANK CECCHINI, GEORGE SPEZIALE and JOHN LEPITO, *Petitioners*,

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

All of the above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 13, 1978.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the PETITIONERS' JOINT APPENDIX hereto. The opinion rendered by the District Court for the District of Connecticut on the appellants' joint Motions to Suppress is reported at 430 F. Supp. 931.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 13, 1978. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 7, 1978, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1954(1).

Questions Presented

1. Whether compliance with Section 2518(1)(E) of Title 18, U.S.C., is a "stringent pre-condition" to the issuance of an interception order under Title III of the Omnibus Crime Control and Safe Streets Act of 1968?

2. Whether or not Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes or contemplates a joint application for the simultaneous interception of both wire and oral communications?

3. Did Sections 2510(11) and 2518(10)(a) of Title 18, U.S.C., confer upon these appellants an automatic standing to challenge the interceptions since the several surreptitious entries permitted unlawful interceptions, were not sufficiently authorized on the face of the interception authorization, and were not made in conformity with the District Court's express order of authorization or approval?

4. Whether Title III and the Fourth Amendment to the United States Constitution, permit surreptitious entries to install oral and wire interception devices without specific authorization by Court order, as was held in the Second Circuit precedent to the instant case in *United States* v. *Scafidi*?

5. Whether or not the summary decision in the instant appeal has erroneously enlarged the holding in *United States* v. *Scafidi* to permit surreptitious entries to install oral and/or wire interception devices into premises other than "target premises" which other premises are not mentioned or referred to in any way in the Government's Application, or in the Court's Order and Authorization?

6. Whether or not Title III implicitly or explicitly authorizes a District Court to order a surreptitious entry to install oral and/or wire interception devices?

Statement of the Case

(I.) Proceedings to Date:

On April 7, 1976, a Grand Jury sitting at Hartford, Connecticut, returned several true bills of indictment charging various defendants with violations of various Federal criminal statutes. Said indictments stemmed in large part from the Grand Jury's investigation of "organized crime" in the Hartford area, which investigation was

principally based on conversations overheard by means of electronic surveillance.

In Criminal No. H-76-37, the Grand Jury returned an eight-count indictment charging twenty defendants with the following:

Count One: that the co-defendants Michael T. O'Brien and Anthony D. Volpe did engage in an enterprise affecting interstate commerce, to wit an illegal gambling and debt collection business utilizing facilities at 103 New Britain Avenue, Hartford, Connecticut, and in the conduct of said enterprise engaged in a pattern of racketeering activities and the collection of unlawful (usurious) debts; in violation of 18 U.S.C. §§ 1962(c), 1963 and 2.

Count Two: that the co-defendants O'Brien and Volpe and seventeen named but unindicted co-conspirators conspired to engage in the aforesaid enterprise through a pattern of racketeering activity and the collection of an unlawful debt, in violation of 18 U.S.C. §§ 1962(d) and 1963.

Count Three: that the co-defendants O'Brien, Volpe and John T. Dellaferra, Charles Boornazian, Eugene Poulin, John Castagna, Lawrence DiBenedetto, William Jacomini, Richard Bovino, Michael Chiarizio, Robert E. Morris, Frank Cecchini, George Speziale, Andrew Mascola, Ralph Irace, John Lepito, Joseph Guerriero and William Grant, Jr., conducted, managed, supervised and directed all or part of an illegal gambling business together, which bookmaking and numbers business was in substantially continuous operation for a period of in excess of thirty (30) days, and has a gross revenue of $2,000 or more on one or more days and involved five or more persons, and which was in violation of the laws of the State of Connecticut, in violation of 18 U.S.C. §§ 1955 and 2.

Count Four: that the co-defendants named in Count Three conspired to conduct the aforesaid illegal gambling business in violation of 18 U.S.C. § 371.

Count Five: that the co-defendants Volpe and DiBenedetto, and one Ronald Del Mastro conspired to use extortionate means to collect from one debtor George DeMirs an extension of credit in the approximate amount of $1,200; and that Del Mastro, Volpe and DiBenedetto conspired to make explicit and implicit threats of violence to cause harm to said DeMirs, in violation of 18 U.S.C. § 894.

Count Six: that defendant O'Brien used extortionate means to attempt to collect from debtor Robert Hames an extension of credit in the approximate amount of $3,500; and that O'Brien expressly and implicitly, by use of a telephone call, threatened the use of violence to cause harm to Hames, in violation of 18 U.S.C. § 894.

Count Seven: that O'Brien, and co-defendants John Sullivan and Francis J. Campanelle conspired to use extortionate means to collect an extension of credit from Joseph C. Barresi, a debtor; and they conspired to use violence and to make explicit and implicit threats of the use of violence and other criminal means to cause harm to the person and property of said Joseph C. Barresi and others, in violation of 18 U.S.C. § 894.

Count Eight: that defendant Volpe corruptly endeavored to influence one Betty Beaulieu not to testify before an investigating Federal Grand Jury sitting at Hartford, Connecticut, and thereby corruptly endeavored to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Connecticut, in violation of 18 U.S.C. § 1503.

In Criminal No. H-76-41, the Grand Jury returned a one-count indictment charging the co-defendants and co-

conspirators Anthony D. Volpe, Dennis Byrne and Francis Lisella, and the unindicted co-conspirators Ronald Del Mastro and James Smuckler, with conspiring to convert or steal (hijack) a truck moving as an interstate shipment with a load of meat in violation of 18 U.S.C. § 371.

In Criminal No. H-76-39, the Grand Jury returned a three-count indictment charging the defendant Anne Stefanou, with the following:

Count One: that the defendant, while under oath before a Federal Grand Jury did make a false material declaration concerning her presence at and participation in transactions between Anthony Volpe and Betty Beaulieu involving stolen women's clothing, in violation of 18 U.S.C. § 1623.

Count Two: that the defendant, while under oath before a Federal Grand Jury did make a false material declaration concerning whether or not she had seen and spoken to one Betty Beaulieu on certain occasions, in violation of 18 U.S.C. § 1623.

Count Three: that the defendant, while under oath before the aforesaid Federal Grand Jury did make a false material declaration concerning whether or not she had participated in and had specific recollections of certain phone calls with Anthony Volpe, in violation of 18 U.S.C. § 1623.

Numerous pre-trial motions were filed on behalf of these defendants and argued to the Court. A motion to suppress the fruits of the electronic surveillance was made and argued in all three matters. After a four-day hearing and the filing of briefs, the Court (Clarie, J.) denied said motion in a lengthy memorandum set out in the Joint Appendix hereto. Judge Clarie also denied de-

fendants' motion to disqualify himself from hearing said motions to suppress.

After several pre-trial hearings, absent a specific motion by the Government, and over the opposition of counsel, the Court severed defendants Volpe, O'Brien and DiBenedetto from the other defendants in Crim. No. H-76-37, and set the order of trial that these three defendants would proceed to trial first. Prior to trial, the Court severed Count Eight against Volpe and said Count was later dismissed on November 28, 1977.

On April 12, 1977, the trial of appellants Volpe, O'Brien and DiBenedetto commenced with the selection of a twelve-person jury, with four alternates. After a lengthy trial, the appellants moved for judgment of acquittal at the end of all the evidence.

On May 27, 1977, the jury returned a verdict of guilty against appellant Volpe on Counts 1, 2, 3, 4 and 5; against appellant O'Brien on Counts 1, 2, 3, 4, 6 and 7; and against appellant DiBenedetto on Count 5. The jury acquitted appellant DiBenedetto on both Counts 3 and 4. Subsequent motions to set aside these verdicts, to enter a judgment of acquittal and for a new trial were heard and denied by the Court for all three appellants.

On July 5, 1977, Judge Clarie imposed the following sentences: *appellant Volpe*: Count One: not less than three or more than ten years imprisonment and a $20,000 committed fine; Counts Two, Three and Four: three years imprisonment on each concurrent with the sentence imposed on Count One; Count Five: not less than three or more than ten years imprisonment and a $20,000 committed fine, concurrent with sentences imposed on Counts One through Four; *appellant O'Brien*: the same sentence on Counts One through Four as received by appellant Volpe; Count Six: not less than three nor more than ten

years imprisonment and a $20,000 committed fine concurrent with sentenced imposed on the other counts; Count Seven: not less than three nor more than ten years imprisonment and a $20,000 committed fine concurrent with sentences imposed on all other counts; *appellant DiBenedetto*: on Count Five eighteen months imprisonment and a $5,000 committed fine.

Appellants Volpe, O'Brien and DiBenedetto are at liberty on bond pending the outcome of this appeal.

On June 27, 1977, after the trial of appellants Volpe, O'Brien and DiBenedetto, the Court scheduled the trial of the other defendants in this Indictment. On this date appellants Jacomini, Bovino, Morris, Cecchini, Speziale, Lepito, Dellaferra, Poulin and Boornazian, each entered a plea of "Guilty" to Count Three of the Indictment.

On July 28, 1977, Judge Clarie imposed the following sentences on those aforesaid who plead "Guilty" on Count Three: *Dellaferra*, eighteen months imprisonment, a $3,000 committed fine, execution suspended after serving six months, two years probation, and a dismissal of Count Four; *Boornazian*, eighteen months imprisonment, a $2,500 committed fine, execution suspended after serving four months, two years probation, and dismissal of Count Four; *Bovino*, eighteen months imprisonment, a $2,500 committed fine, execution suspended after serving ninety days, two years probation, and dismissal of Count Four; *Cecchini*, eighteen months imprisonment, a $3,000 committed fine, execution suspended after ninety days, two years probation, and dismissal of Count Four; *Speziale*, eighteen months imprisonment, a $1,000 committed fine, execution suspended after serving ninety days, two years probation, and dismissal of Count Four; and *Lepito*, eighteen months imprisonment, a $2,500 committed fine, execution suspended after thirty days, two years probation, and a dismissal of Count Four.

On July 29, 1977, Judge Clarie imposed the following sentences on those other aforesaid defendants who entered "Guilty" pleas on Count Three: *Poulin*, eighteen months imprisonment, a $500 committed fine, execution suspended, two years probation, and a dismissal of Count Four: *Jacomini*, eighteen months imprisonment, a $2,500 committed fine, execution suspended after serving four months, two years probation, and a dismissal of Count Four; and *Morris*, eighteen months imprisonment, a $1,000 committed fine, execution suspended, two years probation and a dismissal of Count Four.

Appellants Dellaferra, Boornazian, Bovino, Cecchini, Speziale, Lepito, Poulin, Jacomini and Morris are all at liberty on bond pending this appeal. Each pursuant to an agreement with the Government and the Court expressly reserved his right to appeal Judge Clarie's denial of appellants' motion to suppress the fruits of the electronic surveillance. Said reservation of right was mutually agreed upon prior to the entering of pleas of "Guilty" by these appellants on Count Three.

Other Proceedings Concerning Volpe and Byrne, Appellants in Crim. No. H-76-41

On October 12, 1977, both appellants Volpe and Byrne entered pleas of "Nolo Contendere" to this one-count indictment. Each at that time expressly reserved the right to appeal Judge Clarie's denial of appellants' motion to suppress the fruits of the electronic surveillance. The Court accepted the pleas and reservation of right to appeal and entered findings of "Guilty" for both appellants.

On November 28, 1977, Judge Clarie imposed identical sentences on appellants Volpe and Byrne of one year imprisonment, execution suspended, one year probation. Both appellants are at liberty on bond pending this ap-

peal and both exercised their option to commence their probationary supervision on November 28, 1977, despite the pendency of this appeal.

Proceedings Concerning Appellant Stefanou, and Crim. No. H-76-37

On December 13, 1977, appellant Stefanou entered pleas of "Nolo Contendere" to all three counts of this indictment. Appellant expressly reserved her right to appeal Judge Clarie's denial of appellant's motion to suppress the fruits of the electronic surveillance. The Court accepted these pleas and the reservation of right to appeal and entered findings of "Guilty" on all three counts.

On February 14, 1978, Judge Clarie imposed the following sentence on appellant Stefanou: two years imprisonment on each count, suspended after thirty days, a $500 committed fine and two years probation, with this sentence on Counts Two and Three to run concurrently with the identical sentence imposed on Count One. The appellant is free on her own recognizance pending this appeal.

All the aforesaid appellants filed timely Notices of Appeal to this Court. On March 2, 1978, this Court ordered all their appeals consolidated for the purposes of briefing and argument. Lead Counsel and associate lead counsel were also designated by order of this Court, and the Government and appellants were given until April 27, 1978, to file a Joint Appendix in this matter, ten days subsequent to the submission of appellants' consolidated brief.

On June 13, 1978, the United States Court of Appeals for the Second Circuit (Mulligan, C.J., Gurfein, C.J., and

Moore, C.J.) affirmed the judgments of conviction. A copy of the Court's opinion is included in PETITIONERS' JOINT APPENDIX hereto. On June 25, 1978, the defendants moved the Court for a rehearing which motion contained a suggestion that such hearing be conducted *en banc* by the entire Court of Appeals. On August 7, 1978, this motion for rehearing *en banc* was denied. All appellants have been at liberty on bond to date.

On August 14, 1978, all appellants filed a motion in United States District Court to continue their respective bonds pending decision of this Court on this petition. There has been no hearing or disposition on this motion by the District Court to date. In addition, all appellants filed a joint motion to the United States Court of Appeals for the Second Circuit on August 14, 1978, requesting a stay of the mandate pending the filing of this petition. This motion has not yet been decided.

On August 14, 1978, the United States of America filed a Motion For Surrender Order of these appellants in the United States District Court for the District of Connecticut. Said motion requests that all appellants surrender to the U.S. Marshall on September 4, 1978, (Labor Day). Said motion has yet to be heard or disposed of.

(II.) Background Facts From Hearings On Appellants' Joint Motions To Suppress:

On December 16, 1974, the Hon. T. Emmet Clarie signed an order authorizing the interception of wire and oral communications of Michael O'Brien and others at premises known as 103 New Britain Avenue, Hartford. The order was the result of an affidavit signed by Special Agent Dewey L. Santacroce of the F.B.I. and an application filed by Paul E. Coffey and Peter Casey, Strike Force

Attorneys. Authorization to file the application was provided by William B. Saxbe, Attorney General of the United States by way of a memorandum dated December 12, 1974. Neither the authorization, application, affidavit nor order made reference to an entry into premises known as 11 Julius Street or 99 New Britain Avenue.

The Premises

The premises known as 103 New Britain Avenue is the location of the O'Brien-Sullivan Home Improvement Co., which is owned and operated by Michael O'Brien, the central target of the December 16th interception order. This company is one of a number of commercial and residential tenants housed in an L-shaped building known as 11 Julius Street. (Vol. III, p. 33).[1] A portion of the basement area consists of a number of partitioned rooms. As one descends the stairs to the basement, a coin-operated washer and dryer are located immediately to the left (Vol. III, p. 37). Also to the left is small office (Vol. III, p. 37-8). Beyond the furnace is a large, timber wire mesh enclosure which is situated underneath 99 New Britain Avenue (Vol. III, p. 38). Underneath 103 New Britain Avenue is another wire mesh enclosure, access to which is gained through a wire mesh door. (Vol. IV, pp. 243-4). Located in the basement are two telephone terminal boxes. (Vol. IV, pp. 245-6). One terminal box is located on a support column before one reaches the basement and is marked "telephone box and pole of Government's Exhibit 3 of the hearing on the Motion to Suppress. (Vol. III, p. 38). Another box is located in a timber, wire mesh enclosure beneath 99 New Britain Avenue. (Vol. IV, p. 246).

[1] References to Vol. and Pg. herein are to Transcripts of the Hearing on The Motion To Suppress and the Trial, numbered sequentially and in chronological order. Four copies of each such transcript are on file with the Record on Appeal at the United States Court of Appeals for the Second Circuit.

The Initial Visits to the Premises

During the early morning hours of December 17, 1974, Special Agents H. Edward Tickle, a security technician from Washington, Richard D. Ludwig, Dewey Santacroce, James Miller and Phillip Krum arrived at 103 New Britain Avenue. (Vol. IV, pp. 292, 294, 299). Agent Tickle then made a key for 103 New Britain Avenue and entered the premises along with Agent Ludwig. (Vol. IV, pp. 297-299). Agent Tickle then attempted to impression the lock to the rear door entrance to the common basement area but was unable to do so because the lock was malfunctioning. (Vol. IV, p. 301).

Agent Tickle then proceeded to 11 Julius Street, proceeded through the two outer swinging doors and entered into the front hallway area. (Vol. IV, p. 302). He did not attempt to make a key impression to the door leading to the common basement because a skeleton key was needed. At that time the agents ceased their activities for the night. (Vol. IV, p. 303).

During the early morning hours of December 18, 1974, Agents Tickle and Ludwig returned to the premises. (Vol. IV, pp. 246-7, and 306). They were accompanied on this occasion by Special Agent Robert Puckett, a sound technician, and Special Agent McWhorter. (Vol. IV, pp. 237-241). Agent Puckett entered 102 New Britain Avenue with the key made by Agent Tickle on December 17, 1974. Puckett then placed a microphone or bug under the floor of 103 New Britain Avenue where a water pipe ran through a hole in the floor to the basement. (Vol. IV, p. 240). The wires attached to the bug were dropped through the hole and dangled below in the basement. (Vol. IV, pp. 240-1). While Agent Puckett was performing his duties, Agent Tickle and another agent entered the basement area of 11 Julius Street through the use of a skeleton key to the front basement door, which key had been flown in from Washington. (Vol. IV, p. 307). Agent

Tickle then entered the wire mesh cage below 103 New Britain Avenue by picking the lock to the cage door. (Vol. IV, pp. 308-9). Agent Tickle then took hold of the wires from the bug and connected them to the telephone box on the post. (Vol. IV, p. 309). Upon leaving the wire mesh cage he locked the door. (Vol. IV, pp. 309, 332-3). Agent Puckett had in the meantime come down to the basement and assisted in the hookup of bug. (Vol. IV, p. 245). Thereafter Puckett attempted to connect the wires he knew to be at a multiple of telephone number 247-6309 to a circuit wire he had leased from the telephone company. He also tried to connect the bug to another pair of leased wires. (Vol. IV, p. 245). No attempt was made to connect the wiretap or bug to the telephone box inside the cages area below 99 New Britain Avenue. (Vol. IV, p. 246). The attempt to make the foregoing connections were unsuccessful. (Vol. IV, p. 247). While Agent Puckett was engaged in these activities, Agent Tickle went to the rear cellar entrance and made a key to the lock on that door. (Vol. IV, p. 310). Agent Tickle did not file a report of his key-making mission. (Vol. IV, p. 313).

During the evening hours of December 18, 1974, Agent Puckett returned to the premises. (Vol. IV, p. 248). Agens Ludwig and Santacroce accompanied him, but Agent Tickle did not. (Vol. IV, p. 248). Again entry was made into the basement via a key to the front door of 11 Julius Street. (Vol. IV, p. 249). Puckett and Ludwig again attempted to get the interception equipment to function but failed. (Vol. IV, p. 249). In checking the wires, Puckett entered the wire mesh cage below 103 New Britain Avenue. The door to the cage was unlocked and Puckett pulled it open. (Vol. IV, p. 253). Puckett thereafter reported his technical problems to Agent Santacroce. (Vol. IV, p. 254).

The December 19th In Chambers Hearing

On December 19, 1974 from 10:10 a.m. to 10:30 a.m., an in chambers hearing was held concerning the wiretap and bug applications. Present were Judge Clarie, Attorneys Casey and Coffey and Agent Santacroce. Agent Santacroce reported to the Court that the appearances for telephone number 247-6309 were located in a corner of the basement housing 99 New Britain Avenue. (Vol. I, 12-19-74, p. 4). Agent Santacroce further testified that the box under 99 New Britain Avenue was "the sole place that the appearances are available, that would allow us access to utilize those appearances." (Vol. I, 12-19-74, p. 4). Agent Santacroce advised the Court that there was an alternative procedure that could be utilized by running two separate lease lines. (Vol. I, 12-19-75, p. 5). However, Mr. O'Connor of the Southern New England Telephone Co. preferred hooking up to the 99 New Britain Avenue box because it "would be a lot easier than for them to have to do what they would have to do to implement this, time-wise, particularly . . ." (Vol. I, 12-19-74, pp. 5-6).

The Court then asked: "Now, would the additional authority require—what you already have, which is 103 New Britain Avenue, for this wiretap information—it would also require access to 101 New Britain Avenue and 99 New Britain Avenue, is that correct?" (Vol. I, 12-19-74, p. 6). Agent Santacroce responded: "It would only require us to go into 99 New Britain Avenue." (Vol I, 12-19-74, p. 6).

Agent Santacroce advised the Court that entry into 99 New Britain Avenue would not interfere with business activity because: "We would not go in there during the period of business activity." (Vol. I, 12-19-74, p. 8).

Attorney Casey then advised the Court that he had a proposed order he would like to submit. Agent Santa-

croce further advised the Court that "it is also necessary for us to go into 11 Julia [sic] Street, which is this whole entire common basement, in order to hook on the box there, where our microphone wires would come into. So it would be going into both 99 New Britain Avenue and 11 Julia [sic] Street, to get to that box." (Vol. I, 12-19-74, pp. 8 and 9).

At this point the Court expressed concern over the procedure: "He hasn't been served with papers; he doesn't know they are there, and they are trespassers and suppose he injured, grossly injured one of these strangers on his premises? . . ." (Vol. I, 12-19-74, p. 9).

Mr. Coffey then advised the Court that "there is apparently no way that the Court's order can be implemented, unless the Court authorizes these agents to go on the premises . . ." (Vol. I, 12-19-74, p. 10).

Again the Court expressed concern that the proprietor of John's Delicatessen might mistake the agents for burglars and shoot them. The Court then asked: "How expensive would it be to put in these lease wires to the pole?" Agent Santacroce responded that he didn't know but it would involve a time delay. The Court responded: "I think it would be wisdom to do that . . . I think wisdom would dictate that whatever it cost for the leased wire, for the telephone company to put it on a pole there, or down the street a block, that the money is well invested." (Vol. I, 12-19-74, pp. 10-12).

Agent Santacroce then inquired what should be done if the phone company determined that the wiretap could be connected to another location but the microphone bug could not. The Court advised that when the information is obtained from the phone company, the hearing be reopened and the information be put on the record. (Vol. I, 12-19-74, p. 13). *This was never done. The proposed order the Court was asked to sign cannot be found.*

Entry Into 99 New Britain Avenue

At 2:00 p.m. on December 19, 1974, approximately 3½ hours after the in chambers hearing, Agent Puckett and a telephone repairman entered 99 New Britain Avenue. (Vol. IV, p. 255). They met the owner of the Delicatessen. (Vol. IV, p. 256). The repairman told the owner of the Delicatessen he wanted to go to the telephone equipment in the basement. (Vol. IV, p. 257). Agent Puckett did not identify himself. (Vol. IV, p. 256). The repairman and Agent Puckett then went down the stairs at the rear of the Delicatessen into the wire meshed area. (Vol. IV, p. 259). John, the owner, unlocked the door leading into the caged area and they went in. (Vol. IV, p. 259). Thereafter the telephone and microphone wires were connected to the box inside the wire meshed cage below 99 New Britain Avenue. (Vol. IV, p. 260).

Subsequent Visits

During the evening of December 19th, Agent Puckett returned to the basement area with Agent Ludwig. (Vol. IV, p. 261). The purpose of this visit was to make final connections for the wire and oral interception devices. (Vol. IV, p. 261). Entry was made into the basement via 11 Julius Street. (Vol. IV, p. 262). The two outer swinging doors may have been locked, and if they were entry was made with a key. (Vol. IV, pp. 262-263). In any event, the basement door was locked and entry was made by use of a key. (Vol. IV, p. 262).

During the evening of December 20, 1974, Agents Puckett and Ludwig returned to the premises (Vol. IV, pp. 264-265) for the purpose of determining why the microphone or bug was not working. (Vol. IV, p. 265). Again a key was used to gain entrance into the door leading to the basement at 11 Julius Street. (Vol. IV, p. 265). Again Agent Puckett entered the screened area below 103 New Britain Avenue; the door was not locked so he opened it to get in. (Vol. IV, pp. 265-266).

On December 30, 1974, Agents Puckett and Ludwig again entered 11 Julius Street by use of a key to the basement door (Vol. IV, p. 266) and disconnected the tap and bug. (Vol. IV, p. 267). Interceptions at the premises ceased as of 2:57 p.m. on December 30, 1974. (Vol. I, 1-2-75, p. 3).

The January Tap

On January 10, 1975, the Government received authorization from Wallace H. Johnson, Assistant Attorney General for Land and Natural Resources Division for permission to apply for an extension of the wire and oral interception order of December 16, 1974 at 103 New Britain Avenue. On the same date, an in chambers hearing was held. Present were Judge Clarie, Peter Casey, Paul Coffey and Dewey L. Santacroce. Pursuant to the authorization, request was made for an extension of the December 16, 1974 Court order. At the conclusion of the hearing on the extension application, the Court expressed concern that the proposed order did not include a provision authorizing entry into 11 Julius Street. (Vol. I, 1-10-75, pp. 26-32). Mr. Coffey and Mr. Casey attempted to allay the Court's concern (Vol. I, 1-10-75), but the Court insisted that ". . . the application should include the premises at 11 Julia [sic] Street." ()Vol. I, 1-10-75, p. 35). The Court then reserved judgment on the application. (Vol. I, 1-10-75, p. 35).

Thereafter, a letter was forwarded to Mr. Casey by Wallace H. Johnson. The leter is file stamped January 15, 1975 and provides as follows:

> Dear Mr. Casey:
>
> On January 10, 1975, pursuant to 18 U.S.C. 2516, I authorized an application for an order authorizing the interception of oral and wire communications from a premises and a telephone lo-

cated at 103 New Britain Avenue, Hartford, Connecticut. I have since been informed that question has arisen as to the authority of investigative and law enforcement agents to enter upon the premises for the purpose of installing an electronic device for the interception of oral communications and making necessary wire connections for the interception of wire communications authorized pursuant to the subsequent court order issued under 18 U.S.C. 2518. In my view, and that of the Department of Justice, an order authorizing the interception of oral or wire communications carries by implication the authority to make entry for the purpose of installing, maintaining, and removing the necessary electronic devices. In this connection, I note that Congress recognized the need for clearly investing the courts with even more extensive authority to facilitate the implementation of orders authorizing the interception of wire and oral communications. To this end, Congress provided, in part, in 18 U.S.C. 2518(4)(e), as follows:

> An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith with all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted.

I understand that the foregoing views are not entirely dispositive of your question, because the only access to the basement location in which necessary wire connections and the installation of the

> electronic interception devices have to be accomplished must be made through an entrance which, although located in the same building, bears an address different from that of the premises in which the communications which are to be intercepted are uttered. More specifically, it will be necessary to enter a hallway bearing the address of 11 Julia Street, Hartford, Connecticut, in order to install an electronic device in and to make connections to wires leading to the premises bearing the address of 103 New Britain Avenue, Hartford, Connecticut, both of which are part of the same building. At the time I authorized you to make application to a court of competent jurisdiction for an order authorizing the interception of oral or wire communications from the premises located at 103 New Britain Avenue, Hartford, Connecticut, and the telephone located therein, I intended to encompass within my authorization all action reasonably necessary to implement the interception, including any necessary entry for the installation of interception of devices or the making of connections to wires leading to the premises from which the communications were to be intercepted. If my original authorization is not construed to encompass your situation, you may consider this letter as constituting my express authorization to apply to the court for such authority.

On January 16, 1975, the Court signed the extension order, which unlike the December, 1974 order, contained a provision authorizing agents to enter 11 Julius Street. (Vol. II, 1-16-75, pp. 4-5).

On January 16, 1975, at 8:45 p.m. Agents Puckett and Ludwig entered 11 Julius Street with the use of the key to the front basement door. (Vol. IV, pp. 269-70). The microphone and telephone tap were reconnected. (Vol. IV, p. 270).

Entrance was made in the same manner on January 29, 1975, and the microphone was removed and the tap disconnected. The agents again entered the wire mesh area below 103 New Britain Avenue. (Vol. IV, p. 271).

The Connecting to Pole 2602

In his order of December 16, 1974, Judge Clarie ordered the telephone company (hereinafter referred to as "SNETCO") to furnish the Government "all information, facilities and technical assistance necessary to accomplish the interception" of telephone facility 247-6309. The order *did not* order SNETCO to assist in the installation of the bug. Between December 16 and 18, 1974, John O'Connor, security representative of SNETCO advised Special Agent Puckett that the wire interception connection could be made at a telephone box located in the basement of 101 New Britain Avenue or at telephone box 2602 located in the rear of 96 New Britain Avenue. (Mot. to Supp., Defendant's Exhibit 6; Vol. V, pp. 538-546). The telephone box in the rear of 96 New Britain Avenue had no spares or vacancies available on December 16, 1974 so that it could not be used immediately to connect the wiretap. (Vol. V, pp. 558-559). However, it would have been a relatively simple procedure to create spares or vacancies. (Vol. V, p. 587). This procedure would not have created an interruption of service or caused any subscribers to change their telephone numbers. (Vol. V, p. 587). This in fact was a common procedure and could have been easily accomplished by SNETCO personnel. (Vol. V, pp. 588 & 613).

The wiretap was not connected to box 2602 because on December 18, 1974, Special Agent Puckett told Mr. O'Connor that it was not feasible to use that pole. (Vol. V, pp. 611, 613-5). Agent Puckett was of the view that the pole could not be used because in addition to the wiretap he had to also connect a bug. And in order to connect the bug to the pole, a wire would have to be run from

the basement of 103 New Britain Avenue across the street to pole 2602. (Vol. VI, pp. 822-825).

Prior State Wire Interception

At least three law enforcement officials were responsible for gathering the information which went into the affidavit in support of the wiretap and oral communication application of December 16, 1974 and January 16, 1975. Agent Dewey Santacroce was the agent in charge of the investigation (Vol. VI, pp. 805-7) as did Captain Bernard Sullivan of the Hartford Police Department. (Vol. IV, p. 429). At page four of his affidavit, Agent Santacroce acknowledges that "this investigation has been a cooperative effort between Special Agents of the Federal Bureau of Investigation and police officers assigned to the Intelligence Division and the Special Service Squad of the Hartford, Connecticut Police Department."

During September, 1972, a panel of the Superior Court for Hartford County issued a wiretap order for the same premises ordered wiretapped and bugged in this case, 103 New Britain Avenue. (Mot. to Supp., Defts' Ex. 8). As in the instant case, the central target of the state wiretap order was Michael T. O'Brien, a reputed bookmaker who used 103 New Britain Avenue as a front for his allegedly illegal enterprise. The State tap led to the arrest of many of the same persons who found themselves the defendants in these cases. (Mot. to Supp. Govern. Exhibit 5). Captain Sullivan worked with Agent Santacroce in the case at bar, assisted in the 1972 State arrests (Vol. IV, p. 428), and supplied information to the State Police which lead to the 1972 State wiretap order. (Vol. IV, pp. 425-7).

Although Captain Sullivan testified that he never told the F.B.I. Agents about the State tap (Vol. V, p. 682), Agent Santacroce's affidavit reveals that Sullivan did tell

him of a search he conducted of 103 New Britain Avenue on October 3, 1972. (p. 33). This search was conducted at the time of the wiretap arrest. (Mot. to Supp., Govern. Exhibit 5). Shortly after the arrest, *The Hartford Courant* published a story concerning the arrests. The article prominently mentioned the fact that wiretaps were utilized in the investigation. Upon reading the article, F.B.I. Agent Ludwig clipped it and forwarded same to the Bureau's filing clerk in New Haven. (Vol. VI, p. 799).

On September 10, 1973, Agents Santacroce and Ludwig interviewed the target of the State wiretap, Michael O'Brien, in connection with an investigation into the placement of a microphone on the residential telephone of O'Brien's girlfriend, Katherine Malley. (Vol. VI, pp. 770-2) In the course of the interview O'Brien told the agents that in 1972 he had been the subject of a State Police wiretap. (Vol. VI, p. 771). The agents reduced O'Brien's oral comments to written form (Mot. to Supp., Defendants' Exhibit 9), and filed it in a Bureau file on O'Brien. (Vol. VI, p. 775). Prior to the wiretap application in this case, Agent Santacroce reviewed all of his O'Brien file and simply failed to read the report of his interview with O'Brien. (Vol. VI, p. 776).

Agent Ludwig testified that based on the newspaper article in *The Hartford Courant* and the O'Brien interview, he knew of the 1972 State tap and would have included it in the affidavit had he drafted it. (Vol. VI, p. 811).

Thus the evidence is uncontroverted that the three law enforcement officers who helped to draft the affidavit knew at some time prior to December 16, 1974 that Michael T. O'Brien was the subject of a State wiretap order and that 103 New Britain Avenue had been the premises tapped.

Reasons For Granting The Writ

Each of the issues raised herein presents a clear question concerning the meaning and interpretation of federal statutes, that is provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Each issue involves a substantial question involving the ultimate manner in which provisions to allow the invasion of one's privacy concerning oral and wire communications by Federal law enforcement authorities are implemented.

Additionally the issues presented in IV and V herein have been resolved differently by different Circuits of the United States Courts of Appeals concerning the need for specific authorization by Court order to permit surreptitious entries to install oral and wire interception devices. In fact, the five United States Courts of Appeals who have passed on this issue have each seemed to recognize and anticipate the ultimate resolution of this issue by a higher Court, to wit this Supreme Court of the United States. *See, United States* v. *Ford*, 553 F.2d 146 (D.C. 1977); *United States* v. *Agrusa*, 541 F.2d 690 (8 Cir. 1976), *cert. denied*, 429 U.S. 1045; *In Re Application of the United States*, 564 F.2d 637 (4 Cir. 1977); *United States* v. *Scafidi*, 563 F.2d 633 (2 Cir. 1977), *cert. denied, sub nom., Vigorito* v. *United States; Napoli* v. *United States* and *DeLuca* v. *United States*, 23 Cr. L. 4057 (May 17, 1978); *United States* v. *Finazzo*, — F.2d — (August 28, 1978, 6 Cir. Slip. Op., Docket No. 77-5186). The issue presented in VI herein raises the additional question of whether Title III implicitly or explicitly authorizes the District Court to approve a surreptitious entry to install oral and/or wire interception devices. The Sixth Circuit has recently held that Title III grants no such authorization. *United States* v. *Finazzo, supra.*

(I)

Compliance With Section 2518(1)(E) Of Title 18, U.S.C., Is A "Stringent Pre-Condition" To The Issuance Of An Interception Order Under Title III Of The Omnibus Crime Control And Safe Streets Act Of 1968.

The evidence presented at the hearings on the Appellants' Motion to Suppress was uncontroverted that the three law enforcement officers who helped to draft the affidavit in support of the wiretap and oral communication application of December 16, 1974, and January 16, 1975, including affiant Santacroce, knew at some time prior to December 16, 1975, that appellant Michael T. O'Brien and the same premises in question here, 103 New Britain Avenue, had been the subject of an earlier State wiretap order.

Section 2518(1)(E) sets a statutory precondition for obtaining an interception order that requires full disclosure to the judge to whom said application is made of all previous wiretap applications and the action taken thereon. Strict compliance with this procedure is mandated and failure to follow it should have resulted in suppression. *United States* v. *Giordano*, 416 U.S. 505, 527 (1974); *United States* v. *Chavez*, 416 U.S. 562, 580 (1974); *United States* v. *Bernstein*, 509 F.2d 996 (4 Cir. 1975); *United States* v. *Bellosi*, 501 F.2d 833 (D.C. Cir. 1974).

The District Court in ruling on this issue in its memorandum on the Motion to Suppress found this non-disclosure to be unintentional and harmless. The Court of Appeals erred in affirming this issue in that the mandate of Section 2518(1)(E) is one of a stringent precondition to the issuance of an interception order. Non-compliance with this condition merited suppression.

(II)

Title III Of The Omnibus Crime Control And Safe Streets Act Of 1968 Does Not Authorize Or Contemplate A Joint Application For The Simultaneous Interception Of Both Wire And Oral Communications Absent A Showing Of Need For Both Procedures.

The instant case presented a novel instance wherein the Government applied simultaneously for authority to "bug" and wiretap the premises at 103 New Britain Avenue. No additional showing of need to utilize a "bug" in addition to the wiretap was made by the Government or required by the Court.

That "bugging" presents a greater intrusion on one's privacy has been clearly recognized. See, *Olmstead* v. *United States*, 277 U.S. 438 (1928); *Goldman* v. *United States*, 362 U.S. 129 (1942); *Silverman* v. *United States*, 365 U.S. 505 (1961); *Katz* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41, 64 (1967); 18 U.S.C. Section 2511(1)(a)(b) (1970); S. Rep. 1097, *supra*, at 91-92, 161; *United States* v. *Scafidi*, 564 F.2d 633 (2 Cir. 1977) (Dissent of Judge Smith at 645). Section 2516 clearly provides interception of oral communications as an alternative to that of wire communications. Before the greater invasion of privacy occasioned by a bug is authorized the Government should have had to demonstrate a need for investigative means in addition to that shown for the wiretap. If said procedure had been required in the instant case, the various surreptitious entries to install the bug might not have been necessary as the evidence clearly showed the wiretap could have been connected to apparatus outside 103 New Britain Avenue or the basement of 11 Julius Street.

(III)

Sections 2510(11) and 2518(10)(a) Of Title 18, U.S.C., Conferred Upon These Appellants An Automatic Standing To Challenge The Interceptions Since The Several Surreptitious Entries Permitted Unlawful Interceptions, Were Not Sufficiently Authorized On The Face Of The Interception Authorization, And Were Not Made In Conformity With The District Court's Express Order Of Authorization Or Approval.

As a result of numerous surreptitious entries at 103 New Britain Avenue, 99 New Britain Avenue, and 11 Julius Street, both a wiretap and a "bug" were successfully installed to monitor communications at, to, or from the "target premises" at 103 New Britain Avenue. The various moving papers to obtain the Court's Order and Authorization of December 16, 1974, are devoid of any mention of the *other premises* known as 99 New Britain Avenue and 11 Julius Street.

The District Court in its ruling on appellants' Motion to Suppress found appellants' lacked standing to challenge these interceptions and adhered to the "possessory or proprietary interest concept" needed to object to the claimed illegal entries. This Court also followed this line of reasoning in *United States* v. *Scafidi*, 564 F.2d 633 (2 Cir. 1977), *cert. denied sub nom.*, *Vigorito* v. *United States*, *Napoli* v. *United States* and *DeLuca* v. *United States*, 23 Cr. L. 4057 (May 17, 1978). However, in *Scafidi*, the Court recognized "it seemed artificial" to say that one whose voice would not have been intercepted but for the entry had no standing to say the entry was improper. *United States* v. *Scafidi*, *supra* at 639.

Affirming the District Court's finding here on the issue of standing ignored the effect of Sections 2510(11) and 2518(10)(a) which confer statutory standing on one whose voice was overheard to object to unlawful intercep-

tions, or interceptions not sufficiently authorized on the face of the authorization, or interceptions not in conformity with the Court's express order of authorization or approval. The particular facts of this case concerning numerous surreptitious entries to premises other than the "target premises" clearly bring the entries and lack of authority therefore, within the three categories set out in 18 U.S.C. Section 2518(10)(a).

(IV)

Title III And The Fourth Amendment To The United States Constitution Do Not Permit Surreptitious Entries To Install Oral And Wire Interception Devices Without Specific Authorizations By Court Order

and

(V)

The Summary Decision In The Instant Appeal Has Erroneously Enlarged The Holding In *United States* v. *Scafidi* To Permit Surreptitious Entries To Install Oral And/Or Wire Interception Devices Into Premises Other Than "Target Premises," Which Other Premises Are Not Mentioned Or Referred To In Any Way In The Government's Application, Or In The Court's Order And Authorization.

In its earlier ruling in *United States* v. *Scafidi*, a panel of the Court of Appeals for the Second Circuit ruled that interception devices may be installed in the "particular premises" described without a separate Court order authorizing said entry.[2] (Appendix, pp.).

[2] The majority opinion in *Scafidi* was written by Judge Moore with a concurring opinion by Judge Gurfein. Judge Smith dissented. Both Judge Moore and Judge Gurfein sat on the instant appeal.

Scafidi clearly recognized the split authority on this point. *See, United States* v. *Ford*, 553 F.2d 146 (D.C. 1977); *United States* v. *Finazzo*, 429 F. Supp. 803 (E.D. Mich. 1977); *United States* v. *Rowland*, 448 F. Supp. 22 (N.D. Texas 1978); *United States* v. *Agrusa*, 541 F.2d 690 (8 Cir. 1976), *cert. denied*, 429 U.S. 1045; *In Re Application of United States*, 563 F.2d 637 (4 Cir. 1977); *United States* v. *Dalia*, 426 F. Supp. 682 (D.N.J. 1977); *United States* v. *London*, 424 F. Supp. 556 (D. Md. 1976), *aff'd on other grounds*, 556 F.2d 709 (4 Cir. 1977); *United States* v. *Finazzo*, — F.2d — (6 Cir. August 28, 1978, slip op. Docket No. 77-5186); McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says* "Yes"?, 15 Amer. Crim. L. Rev. 1 (1977).

In his concurring opinion in *Scafidi*, Judge Gurfein found it implicit that "ordinarily a single entry need be made" into the *particular premises* absent the exigent circumstances of equipment malfunction. *United States* v. *Scafidi*, *supra* at 644. By affirming the District Court's opinion on the Motion to Suppress here the Court of Appeals has now erroneously enlarged the rule of *Scafidi* to apply to numerous entries to *other premises* not mentioned in any of the Government's moving papers or the Court's Order or Authorization.

The December 16, 1974, order in this case failed to authorize surreptitious entries into the *other premises* (99 New Britain Avenue and 11 Julius Street) or the *target premises* (103 New Britain). In fact, Judge Clarie was never advised that entries were made into 11 Julius Street and/or 103 New Britain Avenue with the use of keys on December 17, 18 (twice), 19, 20 and 30, 1974, in the late night or early morning hours. The Court was never advised that on January 16th and 29th, 1975, similar entries were made. Nor did the Court know of the ruse used on December 19, 1974, to get into 99 New Britain Avenue. In fact, the Court's misgivings

about such *proposed conduct* was made clear at the In Chambers Hearing of December 19, 1974, and the Court required a report back from the Government on the alternatives to the kind of installation. No report was ever made and the agents continued their undisclosed (to the Court) surreptitious entries. (See Appendix to Appellants' Consolidated Brief, pp. 241-254).

This obvious extension of the rule set out in the majority opinion in *Scafidi* is erroneous and violates any reasonable interpretation of Title III and the Fourth Amendment.

Additionally, the Fourth, Sixth, Eighth, and District of Columbia Circuits, *In Re Application of United States, Finazzo, Agrosa,* and *Ford, supra,* have ruled differently than the Second Circuit in *Scafidi,* in effect requiring express authorization by Court order for such surreptitious entries.

In view of the split of authority in these several Circuits and in the District Courts below, we urge this Court to grant this Petition and issue the Writ of Certiorari. This conclusion is mandated by a consideration of the privacy interests involved, the legislative history of Title III, and this Court's recognition in past cases that exigent circumstances are rarely involved in cases of electronic surveillance.

(VI)

Title III Does Not Implicitly Or Explicitly Authorize A District Court To Order A Surreptitious Entry To Install Oral And/Or Wire Interception Devices.

The Sixth Circuit recently decided the case of *United States* v. *Finazzo,* — F.2d — (6 Cir., August 28, 1978, slip op., Docket No. 77-5186). In addition to holding that the Government could not make surreptitious entries

to install listening devices under the circumstances of that case, the court went on to hold that Title III does not implicitly or explicitly authorize a District Court to include such a proviso in its wiretap order. Since this decision was issued only a few days before the filing of this petition counsel has not read the opinion but has discussed the holding with counsel for the defendant Finazzo. As soon as the opinion is received, a supplemental memorandum will be forwarded to the Court.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ALL PETITIONERS

By .....
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Dated: September 5, 1978

APPENDICES

APPENDIX A

(1) Memorandum Opinion Below of United States Court of Appeals for the Second Circuit, dated June 13, 1978

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June, one thousand nine hundred and seventy-eight.

Present: HON. LEONARD P. MOORE,
HON. WILLIAM H. MULLIGAN,
HON. MURRAY I. GURFEIN,
Circuit Judges,

Docket Nos. 77-1313, 77-1317, 77-1344, 77-1347, 77-1350, 77-1355, 77-1367, 78-1033, 78-1082, 78-1083, 78-1084, 78-1085, 78-1090

UNITED STATES OF AMERICA,

Appellee,

—against—

ANTHONY VOLPE, ET AL.,

Appellants.

Appellants appeal from judgments of conviction entered in the United States District Court for the District of Connecticut. The primary contention on appeal is that

Appendix A

(1) Memorandum Opinion Below of United States Court of Appeals for the Second Circuit, dated June 13, 1978

for various reasons which had been raised below, evidence developed as a result of a court-approved wiretap and "bug" should have been suppressed. For the reasons ably and fully stated in Chief Judge Clarie's opinion in Crim. No. H-76-37, et. al, March 15, 1977 we affirm the district court's denial of the suppression motions. Appellants DiBenedetto and Volpe's arguments with respect to severance are unpersuasive. The district court has broad discretion in this area, *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir. 1974) and the standards of *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), have not been met. We have considered the other points raised and find them meritless. The convictions are affirmed.

/s/ LEONARD P. MOORE
LEONARD P. MOORE

/s/ WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN

Appendix A

(2) Ruling on Reconsideration and En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight.

77-1313

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ANTHONY D. VOLPE, et al.,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN

Appendix A

(2) Ruling on Reconsideration and En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight.

Present: HONORABLE WILLIAM H. MULLIGAN
HONORABLE MURRAY I. GURFEIN
HONORABLE LEONARD P. MOORE
Circuit Judges.

77-1313

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ANTHONY D. VOLPE, et al.,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

APPENDIX B

Statutes Involved

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justfying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof,

(i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a

statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire

communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the

communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), sec-

tion 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute

of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91-452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91-644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an

order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or

disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization, or approval.

Such motion shall be made before trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91-358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

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(4) *United States* v. *Scafidi*, 564 F.2d 633 (2d Cir. 1977), *cert. denied sub nom. Vigorito* v. *United States, Napoli* v. *United States*, and *De Luca* v. *United States*, 23 Cr. L. 4057 (May 17, 1978)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 909 to 917, Docket 76-1495.

UNITED STATES OF AMERICA,

Appellee,

—v.—

EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DIMATTEO, SAVERIO CARRARA, MICHAEL DELUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGORITO,

Appellants.

Argued May 16, 1977.

Decided Oct. 12, 1977.

Defendants were convicted in the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, of conducting illegal gambling businesses, and they appealed. The Court of Appeals, Moore, Circuit Judge, held that: (1) the most reasonable interpretation of the orders granting authority to bug private

premises was that the orders implied approval for secret entry to place, repair and/or remove bugs implanted on premises; (2) entries for secret placement, repair and/or removal of bugs were, therefore, valid as they adhered to authorized single purpose of seizing conversations represented in papers on which original orders were granted; (3) affidavits underlying eavesdropping orders were not insufficient on grounds alleged by defendants; (4) evidence including that which was obtained from properly authorized eavesdropping devices, was sufficient to sustain convictions; (5) indictment was not fatally defective for failure to specify type of gambling business particular defendant was alleged to have conducted, and (6) severance of remaining substantive counts upon dismissal of conspiracy count was not required in absence of evidence that prejudice would have otherwise resulted or that conspiracy count had not been alleged in good faith.

Affirmed.

Gurfein, Circuit Judge, concurred and filed opinion.

J. Joseph Smith, Circuit Judge, dissented and filed opinion.

1. Telecommunications—493

Statute which confers standing upon "aggrieved persons" to object to unauthorized electronic surveillance does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge bugging devices. 18 U.S.C.A. § 2510(11).

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2. Telecommunications—493

Only one present at the seizure or with a recognized interest, either possessory or proprietary, in the premises can claim the required expectation of privacy needed to object to an alleged illegal entry. 18 U.S.C.A. § 2510(11).

3. Telecommunications—493

Any issue of unauthorized entry could be raised by defendant who was manager of lounge where allegedly improper surreptitious entries were made by agents to place and recharge bugging devices. 18 U.S.C.A. § 2510(11).

4. Telecommunications—493

An arguable claim to a proprietary interest in apartment where allegedly improper surreptitious entries were made by agents to place and recharge bugging devices was in defendant who was given key to apartment by true lessee so that he could enter on his own. 18 U.S.C.A. § 2510(11).

5. Criminal Law—394.5(2)

Whatever the exact, technical interests, or lack thereof, which the defendants had in the premises which were alleged to have been illegally entered by agents to place and recharge bugging devices, it seemed artificial to say that a person overheard, whose conversation would not have been overheard but for entry, had no standing to move to suppress conversations on a claim that entry was improper. 18 U.S.C.A. § 2510(11).

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6. Telecommunications—493

Whether standing was accorded to only one or any number of defendants to object to allegedly improper surreptitious entries made by agents to place and recharge bugging devices, where court orders authorizing use of bugs and agents' activities were entirely proper under circumstances, it was unnecessary to determine whether standing existed for defendants to raise claim of alleged illegal entries. 18 U.S.C.A. § 2510(11).

7. Telecommunications—496

Though the Omnibus Crime Control Bill of 1968 prohibits all surreptitious police entries to install, repair or remove court-authorized bugs, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. 18 U.S.C.A. § 2510 *et seq.*

8. Telecommunications—496

The most reasonable interpretation of the orders granting authorization to bug private premises was that the orders implied approval for secret entry to place, repair and/or remove bugs implanted on premises. 18 U.S.C.A. § 2510 *et seq.*

9. Telecommunications—496

An order approving electronic surveillance of conversations to be overheard at a particular private place must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect "seizure" of conversations. 18 U.S.C.A. § 2510 *et seq.*

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10. Telecommunications—496

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. 18 U.S.C.A. § 2510 *et seq.*

11. Telecommunications—496

If the instrumentality by which an electronic surveillance is to be carried out is a "bug," the placing of such a bug must of necessity be in the hands of the person so authorized; and such placement would have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations. 18 U.S.C.A. § 2510 *et seq.*

12. Telecommunications—496

While it would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation, neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed, and the court should be required in its order to specify the methods of entry, the appropriate location of the bug, and the steps to insure its proper functioning. 18 U.S.C.A. § 2510 *et seq.*

13. Telecommunications—496

That the wiretapping statute requires general supervision by the courts over the bugging operation does not

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even impliedly impose on the courts the practical enforcement steps. 18 U.S.C.A. § 2510 *et seq.*

14. Telecommunications—496

When an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required. 18 U.S.C.A. § 2510 *et seq.*

15. Telecommunications—496

Subsequent entries for repair or battery recharging do not alter rule that when an order has been made upon adequate proof as to probable cause for installation of a device in particular premises, no separate order authorizing entry for installation purposes is required. 18 U.S.C.A. § 2510 *et seq.*

16. Telecommunications—496

Entries for secret placement, repair and/or removal of bugs were not invalid as long as they adhered to authorized single purpose of seizing conversations represented in papers on which original orders were granted. 18 U.S.C.A. § 2510 *et seq.*

17. Telecommunications—496

Affidavits underlying order authorizing electronic surveillance sufficiently demonstrated need to bug particular apartment where physical surveillance had detailed regular goings and comings of defendants and analysis of apartment's trash had revealed betting slips and records. 18 U.S.C.A. § 2510 *et seq.*

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18. Telecommunications—496

Order authorizing electronic surveillance of lounge was not invalid for insufficiency of underlying affidavit where affidavit presented information received from confidential informants with established records of credibility; in addition, physical surveillance identified comings and goings of principal suspects. 18 U.S.C.A. § 2510 *et seq.*

19. Telecommunications—496

Affidavit underlying order authorizing electronic surveillance of apartment was not insufficient for failure to demonstrate what other investigative procedures had been tried without success as long as it adequately informed judge of nature and progress of investigation and on difficulties inherent in use of normal law enforcement methods. 18 U.S.C.A. § 2510 *et seq.*

20. Telecommunications—496

Where a single eavesdropping order is extended, tapes do not have to be sealed until end of last extension. 18 U.S.C.A. § 2510 *et seq.*

21. Telecommunications—496

Where intercept is on same premises and involves substantially same persons, an extension under those circumstances requires sealing only at conclusion of whole surveillance. 18 U.S.C.A. § 2510 *et seq.*

22. Criminal Law—444

Once eavesdropping orders were deemed extensions of prior ones, administrative delay in sealing, in only one

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instance more than seven days, was reasonable and fully understandable, but even if later orders were deemed separate events, delays in sealing tapes of conversations after expiration of authorizing orders did not require suppression in view of satisfactory explanation presented by Government for delays. 18 U.S.C.A. § 2518(8)(a).

23. Criminal Law—394.3

That eavesdropping devices placed on subject premises continued beyond their 15-day expiration dates was not such as to require suppression of tapes obtained as a result thereof where authorizations for devices expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods. 18 U.S.C.A. § 2518(8)(a).

24. Telecommunications—496

Requirement of reports, designed to enable district judge to evaluate continuing need for surveillance, is in first instance discretionary with judge authorizing eavesdropping devices; rule is also applicable with respect to sanctions for failure to file timely. 18 U.S.C.A. § 2518(8)(a).

25. Criminal Law—394.3

Authorizing judges did not under circumstances abuse their discretion in failing to suppress tapes obtained from eavesdropping devices for failure of Government to timely file progress reports. 18 U.S.C.A. § 2518(8)(a).

26. Criminal Law—394.3

Failure of Government to name particular defendant in eavesdropping order did not in itself require suppres-

sion of defendant's conversations gathered from that order. 18 U.S.C.A. § 2518(8)(a).

27. Criminal Law—394.3

Misidentification of particular defendant in eavesdropping order did not require suppression of defendant's conversations gathered from that order in absence of evidence that Government was not acting in good faith. 18 U.S.C.A. § 2518(8)(a).

28. Gaming—98(1)

Evidence, including that which was obtained from properly authorized eavesdropping devices, was sufficient to sustain convictions of defendants of operating illegal gambling businesses. 18 U.S.C.A. § 1955.

29. Gaming—85(1)

Indictment which tracked language of statute governing offense of operating an illegal gambling business and specified approximate dates and relevant New York statutes was not clearly defective for failure to specify type of gambling business defendant was alleged to have conducted. 18 U.S.C.A. § 1955.

30. Criminal Law—618

Severance of remaining substantive counts upon dismissal of conspiracy count in prosecution charging operation of illegal gambling businesses was not required in absence of evidence that prejudice would otherwise have resulted or that conspiracy count had not been alleged in good faith. 18 U.S.C.A. § 1955.

Michael E. Moore, Atty., Dept. of Justice, Washington, D.C. (Fred F. Barlow, Sp. Atty., Dept of Justice, Brooklyn, N. Y., and David G. Trager, U. S. Atty. for the Eastern District of New York, Brooklyn, N. Y., William G. Otis, Atty., Dept. of Justice, Washington, D.C., of counsel), for appellee.

Arnold E. Wallach, New York City, for appellant Scafidi.

David J. Gottlieb, New York City (The Legal Aid Society, Federal Defender Services Unit, New York City, William J. Gallagher, New York City, of counsel), for appellant Mascitti.

Richard W. Hannah, Brooklyn, N. Y., for appellant DiMatteo.

Salvatore Piazza, Brooklyn, N. Y., for appellant Carrara.

Max Wild, New York City, for appellants DeLuca and Napoli, Sr.

Thomas J. O'Brien, New York City, for appellant Napoli, Jr.

Dominick L. DiCarlo, Brooklyn, N. Y. (Donald E. Nawi, New York City, of counsel), for appellant Voulo.

Gustave H. Newman, New York City, for appellant Vigorito.

Albert J. Brackley, Brooklyn, N. Y., on the brief, for appellant DeLuca.

Rubin, Baum, Levin, Constant & Friedman, New York City, of counsel, for appellant Napoli, Sr.

Before MOORE, SMITH and GURFEIN, Circuit Judges.

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MOORE, Circuit Judge:

Nine defendants, Eugene Scafidi, Robert Voulo, James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Sabato Vigorito, Saverio Carrara, Bario Mascitti, and Anthony DiMatteo appeal their convictions, after a jury trial before Chief Judge Mishler in the Eastern District of New York, for operating illegal gambling businesses in violation of 18 U.S.C. § 1955.

The counts upon which the various defendants were convicted related to operations at different times and places. More specifically, twenty defendants were tried together on four counts of a seven-count indictment. Scafidi and Voulo were convicted on Count Two (the "967 East Second Street Count") of conducting an illegal gambling business from March, 1972 to July 1972. Appellants Napoli, Sr., Napoli, Jr., DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo were convicted on Count Four (the "Hiway Lounge Count") of conducting an illegal gambling business from April, 1973 to June, 1973. Count Three (the "Apartment 309 Count") was dismissed after trial because the jury did not find five people involved in that gambling business, as required by § 1955. Count Seven, the conspiracy count, was dismissed at the close of the Government's case because the indictment alleged a single conspiracy but the evidence showed at least two. Sentences for the defendants ranged from five years in prison and a $20,000 fine (Napoli, Sr.) to two months in prison and 34 months probation (Scafidi).

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I.

The evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count).

The 967 East Second Street Count: Scafidi and Voulo.

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence at the above address. They discovered Voulo and two others in the basement operating a policy "bank". They seized a great deal of betting paraphernalia, some of which contained Voulo's fingerprints.

Visual surveillance prior to the search had established that Voulo, Scafidi and others had been using the residence for more than one month. Apparently, Scafidi regularly picked up daily policy "ribbons" for delivery to the ring's "controllers" around the city.

Also, a warrant-authorized search of 405 Elder Lane in Brooklyn in June, 1971, had found Scafidi and Voulo standing at a table piled high with betting slips, adding machines and cash.

The Apartment 309 Count: DiMatteo, Mascitti, Scafidi, Voulo, and Rocco Riccardi (all charged, but count dismissed after guilty verdicts were rendered only against the first four).

The evidence on this count consisted primarily of tape recordings made pursuant to court-ordered electronic

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equipment (referred to herein as "bugs") placed at the apartment of a friend of Mascitti. The friend allowed Mascitti to use the apartment for a few hours each afternoon while she was absent. DiMatteo and Mascitti were shown to be "bank" workers who called Scafidi about gambling at least once each day. A court-ordered wiretap of Scafidi's home phone showed that he operated a lottery "accounting office". Because one defendant, Riccardi, was acquitted on this count, the Government failed to show the involvement of five people in the operation, as necessary under § 1955. The count was thus dismissed.

Three court orders had authorized the bugs at Apartment 309: Orders 309-I, 309-II, and 309-III. 309-I was issued by Judge Orrin G. Judd on December 8, 1972, and authorized interceptions for 15 days. 309-II was issued by Judge Jack B. Weinstein on January 15, 1973, permitting interceptions for 15 days. 309-III was issued by Judge George Rosling on February 20, 1973, approving interceptions for 15 days at Apartment 309 and at Scafidi's residence in Queens. All the orders listed some of the defendants by name and included "others as yet unknown" as targets. The bugs at Apartment 309 were installed on the night of December 8, 1972, after the building superintendent gave the agents a key to gain entry. The agents re-entered the apartment once more during the surveillance to reposition one bug.

Because the Apartment 309 Count was ultimately dismissed, any investigatory errors of the police are relevant on appeal only to the extent that the evidence presented for this Count might have "spilled over" to affect other counts.

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The Hiway Lounge Count: The Napolis, DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo.

This was the principal count. Court-ordered bugs revealed that the Lounge was the headquarters for a massive numbers game. James Napoli, Sr. was the leader, with Napoli, Jr., Carrara, and Vigorito working as "controllers". DeLuca worked as an "accountant", and Mascitti and DiMatteo were "bankers".

The bugs at the Lounge had been installed pursuant to three court orders: Orders Hiway-I, Hiway-II and Hiway-III. Hi-way-I was issued by Judge John R. Bartels on April 12, 1973, authorizing interceptions for 15 days excluding Sundays. The named targets were the Napolis, DiMatteo, DeLuca, Martin Cassella and Richard Bascetta. Hiway-II was issued by Judge Bartels on May 3, 1973, *i.e.*, three days after the end of Hiway-I, authorizing the bugs for 15 more days, excluding Sundays. The targets named were the Napolis, DeLuca, Voulo, several non-appellants, and "others as yet unknown". Hiway-III was issued on May 24, 1973, *i.e.*, three days after the end of Hiway-II. The tapes obtained by Hiway-III were not sealed until more than three months later. No evidence from Hiway-III was introduced at trial.

The listening devices used in the Lounge were placed by FBI agents on the night of April 12-13, 1973. They were originally placed with one at the bar and one in a back room. During the pendency of Hiway-I the agents re-entered the Lounge to move the bar bug into the back room. During the three-day "pause" between Hiway-I and Hiway-II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the bugs. At some point dur-

ing Hiway-II and Hiway-III the agents re-entered to restore the batteries once again.

II.

The appellants raise many points of alleged error and each adopts the points argued by the others.

Besides the question of standing, namely, the right to question the legality of the surreptitious entries by agents to place the electronic devices which recorded the appellants' conversations, appellants' arguments focus primarily no various claims that the warrants pursuant to which the agents acted were for numerous reasons illegal and violative of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*

At the close of the Government's case, the conspiracy count was dismissed as to all appellants because of the discrepancy between the single conspiracy alleged in the indictment and the evidence of multiple conspiracies shown at trial. The Court's dismissal of the conspiracy count gives rise to appellants' claim that reversible error resulted from the Court's refusal to grant a mistrial or to sever the trial as to the individual defendants. Their claim is that the spill-over effect of the evidence admitted pursuant to the conspiracy count was highly prejudicial and probably responsible for the respective convictions.

Whether appellants have standing to object to the surreptitious entries of Apartment 309 and the Hiway Lounge.

Appellants argue that the evidence derived from the bugs planted in Apartment 309 and the Hiway Lounge

should be suppressed because of allegedly improper surreptitious entries made by the agents to place and recharge the bugging devices. The Government contends that none of the appellants has standing to question the entries into Apartment 309, and that only Napoli, Sr. has standing to object to the entries into the Lounge.

[1, 2] All of the appellants were in some way overheard on the bugs planted in Apartment 309 and/or the Lounge. Thus, they all claim that they have standing to object to any unauthorized entries because they are "aggrieved persons" within the meaning of 18 U.S.C. § 2510(11). But that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. *See Alderman* v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (proprietor can object to any unauthorized wiretap; those overheard can object only to their voice being overheard); and *Brown* v. *United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

[3, 4] The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because

the true lessee, his friend, lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

[5, 6] Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry.

Whether a court order authorizing illegal entry for secret placement, repair and/or removal of bugs is required as a part of, or in addition to, the court order authorizing the use of bugs.

[7] Mascitti and his co-appellants claim that Title III of the Omnibus Crime Control Bill of 1968, 18 U.S.C. § 2510 *et seq.*, prohibits all surreptitious police entries to install, repair or remove court-authorized bugs. However, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. *See United States* v. *Ford*, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977); S. Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968).

There remains the question of whether the authority granted by Title III is properly implemented where the court which approves the use of bugs does not explicitly authorize, either in the authorization order or in a separate order, secret break-ins to place, repair and/or remove the bugs. The Government argues that permission to make secret entries is at least implied in the bug authorizations here. Appellants argue, however, that all evidence gathered must be suppressed unless the court specifically authorizes secret entries.

The courts appear to be split on this issue, particularly after the recent District of Columbia Court of Appeals decision wherein it was held that the legislative purpose of Title III requires a separate court order for entry, *United States* v. *Ford*, 553 F.2d 146 (D.C. Cir. 1977). *See United States* v. *Altese*, No. 75 Cr. 341 (E.D.N.Y., Oct. 14, 1976) (separate order *not* required); *United States* v. *Dalia*, 426 F. Supp. 862, 865-66 (D.N.J. 1977) (separate order *not* required); *United States* v. *Finazzo*, 429 F. Supp. 803, 806-8 (E.D. Mich. 1977) (separate order required). It must be noted that until the District of Columbia Circuit spoke on this issue, it was generally considered proper practice *not* to require a separate warrant for entry.

The orders in our case, after a recital of facts charging that various appellants "have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning in whole or in part a gambling business" in violation of State and Federal law, authorized the agents to intercept oral communications of the appellants specified therein at the named premises. The orders further provided that

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> "this authorization to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception. . . ." App. at A238, A276.

There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

[8, 9] But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

As Chief Judge Mishler stated below in his Memorandum Decision dated October 14, 1976,

> "[I]t is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment." App. at A133.

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[10, 11] Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

[12, 13] It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning. Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss the best (or least objectionable) method of entry and the areas for the installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its

supervisory requirements, makes no mention of any need for a separate entry order. That the statute requires general supervision by the courts over the bugging operation does not even impliedly impose on them the practical enforcement steps.

[14] We, therefore, hold that when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required.

[15, 16] Nor do the subsequent entries for repair or battery recharging alter this result. These were not entries for any purpose other than that originally authorized. No greater incursion into the appellants' privacy occurred from the re-entries than resulted from the oroginal entries. Furthermore, there is no suggestion that in any of the entries the FBI agents seized or attempted to seize or inspect papers or other articles not embraced in the order. They adhered to the authorized single purpose of seizing conversations represented in the papers on which the orders were granted as being of a criminal nature.

Whether the Government violated various provisions of Title III.

[17] Mascitti contends that the affidavits underlying Order 309-I did not sufficiently demonstrate the need to bug the particular apartment. This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

[18] Napoli, Sr. presents a similar insufficiency contention regarding the affidavit for interceptions at the Hiway Lounge. But the affidavit presented information gleaned from the bug of Apartment 309 as well as information gotten from confidential informants with established records of credibility. Also, physical surveillance identified the comings and goings of the principal suspects. The 25-page affidavit of Special Agent Parsons reveals more than sufficient information to justify the issuance of the Hiway-I warrant. App. at A277-A302.

[19] DiMatteo argues that the affidavit underlying the bugs at Apartment 309 did not sufficiently demonstrate what other investigative procedures had been tried without success. *See* 18 U.S.C. § 2518(1)(c). But the affidavit adequately informs the judge of the "nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods", which is precisely what it has to do to satisfy the statute. *United States* v. *Hinton*, 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied*, 429 U.S. 1066, 97 S. Ct. 796, 50 L. Ed. 2d 783 (1977); *United States* v. *Fury*, 554 F.2d 522, 530 (2d Cir. 1977).

Mascitti, DiMatteo and Vigorito argue that the "delays" in sealing the tapes of conversations after the expiration of their authorizing orders require suppression of the tapes.

[20-22] In *United States* v. *Fury*, *supra*, 554 F.2d at 532-33, we held that, where a single order was extended, the tapes did not have to be sealed until the end of the last extension. Where the intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires

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sealing only at the conclusion of the whole surveillance. *United States* v. *Principie*, 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), *cert. denied*, 430 U.S. 905, 97 S. Ct. 1173, 51 L. Ed. 2d 581 (1977). The foregoing applies to the short delays in sealing 309-I and 309-II as well as Hiway-I and Hiway-II, for once the later Orders are deemed extensions of the prior ones, the administrative delay in sealing—in only one instance more than seven days—is reasonable and fully understandable. Even if the later Orders are deemed separate events, the sealing delays are quite distinguishable from those in the case relied upon by the appellants, *United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976), where the unexcused delay was for over eight months.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to Order 309-III. These tapes were sealed after a delay of seven days caused primarily by the preoccupation of Special Attorney Barlow with preparations for the upcoming trial. Testimony presented to the trial judge made clear that the delay was not the result of any intent to evade statutory sealing requirements or to gain any tactical advantage. We agree with the trial judge that the Government has presented a satisfactory explanation for this short delay, fully in accord with the requirements of 18 U.S.C. § 2518(8)(a). *United States* v. *Fury*, *supra*, 554 F.2d at 533.

[23] Vigorito argues that the Government continued the Hiway-I and -II bugs beyond their 15-day expiration dates. But the authorizations for the bugs expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods.

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[24, 25] Mascitti contends that the Government's failure to timely file "progress reports" to the authorizing judges requires suppression of the tapes gotten from the bugs. In several instances involving the 309 Orders, progress reports were filed up to two weeks late or not at all; with the Hiway Orders, one report was filed two days late. While these reports should have been timely filed, the sanction for failure to do so is surely not automatic suppression of the tapes. The requirement of reports, designed to enable the district judge to evaluate the continuing need for surveillance, is in the first instance discretionary with the judge authorizing the bugs. *See United States* v. *Iannelli*, 477 F.2d 999, 1002 (3d Cir. 1973), *aff'd*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). So, surely, are any sanctions for failure to file timely. *See* 18 U.S.C. § 2518(6). The judges here clearly did not abuse their discretion.

[26] Carrara argues that the Government's failure to name him in the Hiway-II order requires suppression of his conversations gathered by that order. This argument is entirely refuted by *United States* v. *Donovan*, 429 U.S. 413, 97 S. Ct. 658, 50 L. Ed. 2d 652 (1977). Napoli, Sr.'s similar claim is also refuted by *Donovan*.

[27] DiMatteo argues that the misidentification of him as "Pasquale Rossetti" in Order 309-I requires suppression. This argument is frivolous in light of the complete absence of evidence that the Government was not acting in good faith. And the argument of DiMatteo based on failure to serve a timely inventory notice is foreclosed by *United States* v. *Donovan*, *supra*. *See also United States* v. *Variano*, 550 F.2d 1330, 1335-36 (2d Cir. 1977).

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Whether there was sufficient evidence to convict Scafidi and Carrara.

[28] Only Scafidi and Carrara question the sufficiency of the evidence against them.

Scafidi was observed regularly using 967 East Second Street. In fact, he arrived at the apartment once while the police were searching it. Prior to and subsequent to the use of the apartment, Scafidi had been involved with policy rings which used the same type of wagering records and the same runner identifications. Also, Scafidi's phone calls from his home, properly intercepted by wiretaps, convincingly proved his involvement with the venture.

Carrara was taped while in several incriminating conversations with Napoli, Sr. which strongly support the inference that Carrara was actively involved in the ring as one of its "controllers". The jury properly convicted him on this basis.

Whether Count Four of the indictment (the Hiway Lounge Count) was legally sufficient.

[29] Napoli, Sr. contends that the Hiway Lounge count of the indictment was fatally defective for not specifying the type of gambling business he was alleged to have conducted. This argument holds no merit. The indictment tracked § 1955 while specifying approximate dates and relevant New York statutes. This is sufficient under *United States* v. *Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985, 94 S. Ct. 1579, 39 L. Ed. 2d 882 (1974).

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Whether appellants were prejudiced by "spill over" from their joint trial.

[30] Most of the appellants (Napoli, Jr., Mascitti, Vigorito, Voulo, DeLuca, and Carrara) argue that once the trial court dismissed the conspiracy count at the end of the Government's case, the remaining substantive counts should have been severed for separate trials. The settled rule is that such a severance is not required unless prejudice would otherwise result or unless the conspiracy count had not been alleged in good fiath. *United States* v. *Ong*, 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075, 97 S. Ct. 814, 50 L. Ed. 2d 793 (1977). There is no evidence here of bad faith on the part of the Government, and the conspiracy count was not frivolous; it was dismissed only for variance. The trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants. Moreover, the defendants convicted were found guilty on strong evidence, greatly reducing any risk of prejudice from joinder.

We have carefully considered all of the numerous issues raised by the appellants and find them to be without merit. The convictions are affirmed.

GURFEIN, Circuit Judge, concurring:

The dissenting opinion of my respected brother, J. Joseph Smith, and the split in the circuits, *see United States* v. *Ford*, 553 F.2d 146 (D.C. Cir. 1977), and *compare United States* v. *Agrusa*, 541 F.2d 690 (8th Cir. 1976), impels me to add some of my own reasons for

concurring in the majority opinion. Congress has constructed a statutory scheme for meeting the problems raised in *Berger* v. *New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967), and *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The issue is narrow. When a federal agent obtains access by trespass to premises in which he has been ordered to install a device to intercept oral communications by a court order which faithfully follows Title III and which includes a finding of probable cause, has he nevertheless intercepted conversations in a lawless manner as if he had no court order at all? Was there in fact "a neutral predetermination of the *scope* of [the] search"? *Katz* v. *United States*, 389 U.S. at 358, 88 S. Ct. at 515. Or are entries to plant "bugs" themselves unconstitutional invasions of privacy *distinct from* the actual eavesdrop sanctioned in the order? An affirmative answer was "[e]ssential to [the] holding" in *United States* v. *Ford*, *supra*, 553 F.2d at 170, on *constitutional* grounds. I respectfully disagree.

Title III covers oral interceptions ("bugging") without prescribing any duties for the judicial branch on the method to be used in installing the "bug". These statutory requirements were carefully tailored to meet the constitutional requirements set out in *Berger* and *Katz*. *See United States* v. *Tortorello*, 480 F.2d 764, 771-75 (2d Cir.), *cert. denied*, 414 U.S. 866, 94 S. Ct. 63, 38 L. Ed. 2d 86 (1973). Congress knew that whether a "bug" was put in place by trespass or otherwise, the use of a "bug" to intercept conversations would require a warrant except when the "bug" is carried by a participant in a face-to-

face conversation, *On Lee* v. *United States*, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1070 (1952), or is used with the consent of a party. *See Katz*, *supra*. The warrant under Title III is limited to interception of oral conversations, 18 U.S.C. § 2518, and does not in any way permit the search and seizure of goods or papers on the premises. Indeed, if such goods or papers were subjected to search under the interception order, suppression would follow. There is an analogy to the opening of foreign mail by the Customs, which is not constitutionally offensive provided the letters themselves are not read. *See United States* v. *Ramsey*, 431 U.S. 606, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977).

What the statute requires is not a specification by the judge of the method for placing the "bug" but simply "a particular description of the place where the communication is to be intercepted". Congress knew that an order such as is under review, that "electronic *surveillance* of the oral communications of the above-named subjects *shall occur* at the above described premises" (emphasis added), would require covert installation. If supporting proof were needed, it is supplied by the 1970 Amendment, Pub. L. No. 91-358, Title II, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), under which the order authorizing interception of an oral communication may direct a landlord or custodian, among others, to furnish the applicant with all facilities and technical assistance necessary to "accomplish the interception *unobtrusively*" (emphasis added). This provision is not for the protection of the subject of the interception order since it is to be incorporated only "upon request of the applicant". In sum, if the enforcement agent thinks that he can achieve such cooperation on his own, he need not get a court order to

execute his mission "unobtrusively" with the cooperation of the landlord or custodian.

With its attention having been called to the need for doing the job "unobtrusively" to the point of enlisting the aid of persons whose aid would amount to trespass, Congress failed to include in Title III a provision such as is found in the New York Criminal Procedure Law § 700.30(8) which requires that an eavesdropping warrant contain "[a]n express authorization to make secret entry upon a private place or premises to install an eavesdropping device if such entry is necessary to execute the warrant",—a provision added to the otherwise almost verbatim copying of 18 U.S.C. § 2518(4). The judge to whom an application is made may, of course, require more than the statute prescribes before he is willing to sign the order, but the requirement that he separately sanction each surreptitious entry is nowhere to be found in the statutory scheme. That can hardly be due to congressional oversight. It is implicit that ordinarily only a single entry need be made, save in the exigent circumstance of equipment malfunction, as was the case here. Because the statute does not require the judge to authorize the manner of entry, a contention that the judge is nevertheless required to do so must rest on a reading of the Fourth Amendment itself.

The Fourth Amendment in part reads: ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The orders here do conform precisely to the requirements of the Fourth Amendment as well as those of § 2518.

They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authorization is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met. I respectfully suggest that cases which have held trespass to be invalid in the absence of *any* warrant whatever are hardly dispositive. *But cf.* the discussion in *United States* v. *Ford, supra.* In *Berger* there was a surreptitious entry but the Supreme Court failed to note it as a *separate* constitutional problem. *See* 388 U.S. at 45, 53-64, 81-82, 96-97, 107-12, 87 S. Ct. at 433. We do have here "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *See Osborn* v. *United States*, 385 U.S. 323, 330, 87 S. Ct. 429, 433, 17 L. Ed. 2d 394 (1966).

Judge Smith notes that there may be a danger in surreptitious entry. That may be conceded, but the federal judge is hardly in as good a position to evaluate such risks as is the law enforcement agent. Common sense will suggest that, in the absence of a plausible ruse,

the "bug" should be put in place when the premises are vacant. A mistake as to whether they are occupied, in fact, could hardly be corrected by a judicial order.

Now that attention has been called to this question in several circuits, it is hoped that Congress will provide the national consensus needed to reconcile the needs of law enforcement with the rights of privacy that belong to all persons until probable cause has been shown and the approval of an independent judge obtained. The finding of what the judge must do in these circumstances to keep the "search" reasonable is, I think, within the prerogatives of Congress. In the meantime, until the Supreme Court speaks, it might be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order, not so much on constitutional grounds, *see United States* v. *Agrusa*, 541 F.2d 690, 696-98 (8th Cir. 1976),[1] as for the protection of the agents.

J. JOSEPH SMITH, Circuit Judge (dissenting):

I respectfully dissent. I would reverse for retrial as to all defendants, with all evidence obtained by electronic surveillance after warrantless surreptitious entries sup-

[1] The Eighth Circuit said: "[W]hile there are two aspects to the search and seizure which occurred here [interception of oral communications after forcible entry] as compared with one in *Osborn* and *Katz*, this difference is, for constitutional purposes, one of degree rather than kind." 541 F.2d at 698. In *Agrusa*, though the order permitted "forcible entry at any time of day or night", it was challenged unsuccessfully on Fourth Amendment grounds.

pressed. The course followed by the agents here makes a mockery of the promise that the "dirty business" of electronic eavesdropping authorized by the Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), would be strictly supervised and controlled. Title III of the 1968 Crime Control Act was drafted with the *Berger* and *Katz* decisions as a guide, including the *Katz* requirement to "conduct the search within precise limits established by a specific court order . . ." 1968 U.S. Code Cong. & Admin. News, pp. 2162, 2163. It is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed to be unoccupied. The Congress recognized the existence of such devices as the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette pack. 1968 U.S. Code Cong. & Admin. News, p. 2183. Electronic devices in some instances might be installed in a manner not requiring entry by the officers into the premises. See *United States* v. *Ford*, 180 U.S. App. D.C. 1, 6 n. 20, 553 F.2d 146, 151 n. 20 (1977); cf. the "spike mike" of *Silverman* v. *United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). Because of its dangers, "bugging" as distinguished from wiretapping, is relatively little used. See *United States* v. *Ford*, *supra*, 553 F.2d at 149, n. 12. The choice of methods should be made known to and passed on by the magistrate.

Appendix C

Opinions Relevant to Federal Question of Interpretation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as Decided in Various Circuits.

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in *Ford* and draw the line here.

Respectfully submitted,

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